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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File:

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

JAN 30 2003

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PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was approved by the Director, Vermont Service Center. Upon subsequent review of the record, the director properly served the petitioner with notice of his intent to revoke the approval of the preference visa petition, and his reasons therefore, and ultimately revoked the approval. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Delaware and authorized to do business in the State of Virginia. The petitioner claims to be engaged in international trade and development of investment opportunities. It seeks to employ the beneficiary as its vice-president of business development. Accordingly, it seeks classification of the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager.

The director initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity for the petitioner. The director also determined that the petitioner had not established that a qualifying relationship existed between the petitioner and the claimed foreign entity. After properly issuing a preliminary Notice of Intent to Revoke, the director revoked the approval of the petition on July 20, 2001.

On appeal, counsel for the petitioner submits a brief. Counsel for the petitioner asserts that the evidence initially submitted demonstrated that the beneficiary was acting in a managerial capacity with executive authority and specialized knowledge. Counsel also asserts that the evidence originally submitted demonstrated a bona fide qualifying relationship between the petitioner and the claimed parent company.

Section 203(b)(1)(C) of the Act states:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

Certain multinational executives and managers. An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue

to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The first issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be performing in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Previous counsel for the petitioner initially submitted a lengthy but incomprehensible letter describing several failed projects, several projects under review and several speculative projects in the petitioner's future. Neither counsel nor the petitioner provided evidence that any of the projects came to fruition. Counsel stated that the petitioner was using the services and personnel of its claimed parent company and of numerous unsubstantiated subsidiaries to assist the petitioner in its operations. Counsel also stated that the beneficiary supervised employees in Turkey from his office in Virginia. Counsel noted that "this system of direct supervision is used by major international corporations for their satellite representation offices around the world." Counsel then provided "examples of management decisions communicated via email." The examples consisted of decisions purportedly made by the beneficiary about the employment and salaries of individuals for a company other than the petitioner and about utilizing the marketing services of the claimed parent company. Counsel further provides a broad position description of the beneficiary's duties including management and oversight of developing business opportunities between the United States and the Turkish Republic. Counsel states that the beneficiary's focus has been to develop business opportunities that will benefit various businesses owned and operated by the claimed parent company. Apparently, the beneficiary identifies the opportunities and then attempts to develop the opportunities. Counsel also noted that the Act allows a beneficiary to manage an essential function within the organization, or a department, or subdivision of the organization.

Counsel alludes to the petitioner's staff in Turkey that purportedly performs the daily tasks of the petitioner and seems to assert that the beneficiary is managing an essential function through these employees rather than performing the function. Counsel does not enlighten the Service as to the nature of this essential function. Counsel does note that the beneficiary has made trips to Turkey to supervise the petitioner's projects in Turkey.

The petitioner also provided its organizational chart depicting a chairman of the board, a president, the beneficiary's position of vice-president of business development, a vice-president of operations, and a vice president of health systems. There were no other positions depicted on the chart.

As noted above, the director initially approved the petition but after a review of the record issued a Notice of Intent to Revoke

the approval as the approval had been issued in error. The director indicated that the beneficiary appeared to be involved in performing the day-to-day functions that were required to operate a company.

On May 11, 2001 in rebuttal to the Notice of Intent to Revoke, the petitioner's current counsel asserted that the evidence previously submitted directly contradicted the director's findings. Counsel also requested an extension of time of 30 days to obtain additional evidence of fiscal activity of the petitioner. On July 20, 2001, the director having received no further information revoked the approval of the petition.

On appeal, counsel for the petitioner contends that the Service cited no authority allowing the revocation of the approval twenty months after the approval. Counsel also contends that it is inequitable to revoke the approval of the petition twenty months after the approval. Counsel further contends that the beneficiary has met the four factors of managerial capacity. Counsel asserts that the beneficiary managed the petitioner's office, supervised and controlled the work of other professional employees, hired and fired personnel, held a senior position, and exercised discretion over day-to-day operations. Counsel asserts that the beneficiary managed projects not people. Counsel finally cites an unpublished decision asserting that a sole employee of a company may be a manager or executive if independent contractors are used or the business is complex.

Counsel's contentions are not persuasive. Section 205 of the Act, 8 U.S.C. 1155, states that "[t]he Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [of the Act]."

A Notice of Intent to Revoke approval of a visa petition was properly served on the petitioner at its last known address. The Notice of Intent to Revoke was properly issued for "good and sufficient cause" as the evidence of record at the time the notice was issued, warranted a denial of the visa petition based upon the petitioner's failure to meet its burden of proof. The decision to revoke will be sustained where the evidence on record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intent to revoke, would warrant such denial. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of a petition's approval, provided the director's revised opinion is supported by the record. Id.

In addition, counsel's contention that a revocation twenty months after approval is inequitable is not properly in front of the Administrative Appeals Office. The Administrative Appeals Office, like the Board of Immigration Appeals, is without

authority to apply the doctrine of equitable estoppel so as to preclude a component part of the Service from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. See Matter of Hernandez-Puente, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to the Associate Commissioner for Examinations, through the regulations at 8 C.F.R. 103.1(f)(3)(iii).

Further, the director's decision indicates that the approval was issued in error. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. Sussex Engg. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988).

Counsel's assertion that the petitioner has provided sufficient evidence to demonstrate that the beneficiary has met the criteria of managerial capacity is without merit. First, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Second, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Contrary to counsel's assertions that the email correspondence establishes that the beneficiary managed the petitioner's office, the petitioner has not provided any independent evidence of employees under the beneficiary's supervision. The record lacks evidence that the petitioner employs anyone other than the individuals noted on the petitioner's organizational chart. Moreover, the organizational chart does not show any position under the supervision of the beneficiary. Further, counsel's assertions that the beneficiary supervises individuals and independent contractors that are outside the United States appears to vitiate the need for the beneficiary's employment in the United States. Counsel's assertion that the beneficiary manages projects is not supported in the record. As noted above, the record contains assertions by the petitioner's previous counsel that the petitioner attempted and planned a number of projects. However, the record is deficient in evidence revealing the actual existence of those projects.

Counsel's citation to an unpublished decision is injudicious. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the unpublished decision. Moreover, unpublished decisions are not

binding in the administration of the Act. See 8 C.F.R. 103.3(c). The petitioner has not provided sufficient independent evidence that the beneficiary has been or will be employed in a managerial capacity. Counsel has not provided sufficient evidence to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and a qualifying entity.

8 C.F.R. 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

The petitioner claims to be owned by the following individuals and entity:

The petitioner claims to be affiliated with Ihlas Holding Company because of the sharing and exchange of executives, managers and cross directorship. Enver Oren, the father of Ahmet Mucahid Oren, is purportedly the majority shareholder of Ihlas Holding Company. The remaining shares are publicly owned.

To substantiate the petitioner's ownership the petitioner provided copies of its share certificates, stock ledger, Articles of

Incorporation, Minutes of Shareholders Meetings, and By-laws. To substantiate the ownership of the petitioner's claimed affiliated company the petitioner provided an unsigned, undated statement indicating that Enver Oren as the only shareholder with more than 10 percent of the company, owning 51.52 percent.

The director in the Notice of Intent to Revoke stated that there was no parent entity with ownership and control of both the petitioner and the claimed qualifying entity. The director stated specifically that a claimed father and son relationship of two owners did not constitute a qualifying relationship under the regulations. In rebuttal, counsel for the petitioner asserted that the costs and benefits realized by Ihlas Holding demonstrated that there was more than a father and son relationship between the two owners of the petitioner and the claimed affiliated company. The director determined that the petitioner had not established a qualifying relationship.

On appeal, counsel for the petitioner submits wire transfers from Ihlas Holding Company and its subsidiaries to the petitioner. Counsel also notes that the petitioner and Ihlas Holding Company publicize their relationship. Counsel asserts this evidence clearly demonstrates that there is a close relationship between Ihlas Holding Company and the petitioner.

Counsel's assertion is not persuasive. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this immigrant visa classification. Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988); Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); (in nonimmigrant proceedings); See also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982). The public association of two companies is insufficient to demonstrate that two companies are formally affiliated. Likewise wire transfers that do not result in ownership and control are insufficient to demonstrate an affiliate relationship. The petitioner has not submitted any evidence to indicate that either company has entered into enforceable agreements that demonstrate common control between the petitioner and the claimed affiliate. The record does not demonstrate a common control or ownership between the petitioner and the claimed foreign entity. The petitioner has not presented evidence to overcome the director's decision on this issue.

Beyond the decision of the director, the petitioner has not provided sufficient evidence that it is doing business.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere

presence of an agent or office of the qualifying organization in the United States and abroad.

The record does not provide any evidence that the petitioner is conducting business. The petitioner has provided the first page of an Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1997 showing taxable income of \$27,590. Initial counsel asserted that at the time of filing the petition in 1999 the petitioner had attempted to start several projects that had failed and had plans to start other projects. Counsel also stated that the petitioner had ongoing projects but the record contains no evidence of those projects. The petitioner has provided brochures of several jewelry exhibits that show the petitioner had a booth at the exhibits. However, there is no documentation that indicates the petitioner ever sold or bought anything. The record does not reveal evidence that the petitioner is engaged in the regular, systematic, and continuous provision of goods and/or services. For this additional reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.